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In the Supreme Court of the United States

October Term, 1931.

No. 485

CHAMPLIN REFINING COMPANY, *Appellant,*

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., *ET AL., Appellees.*

No. 486

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., *ET AL., Appellants,*

vs.

CHAMPLIN REFINING COMPANY, *Appellee.*

Brief of Oil States Advisory Committee, Amici Curiae.

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(36,299-36,300)

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BRIEF OF OIL STATES ADVISORY COMMITTEE, *AMICI CURIAE.*

(a) Opinion of Court Below.

51 Fed. (2d) 823. Also Record Vol. 1, part 2, pp. 18-248, inclusive.

This cause below was submitted to a statutory court of three judges, Judges Cotteral and Phillips rendering the

majority opinion (Rec. Vol. 1, part 2, p. 218), District Judge Kennamer dissenting (Rec. Vol. 1, part 2, p. 229).

(b) Reason for This Brief.

This suit, in a very vital way, involves the public interest. December 19, 1924, President Coolidge addressed a letter to the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, and the Secertary of Commerce, constituting these cabinet members as the Federal Oil Conservation Board (App., p. 75). Continuously since then, the Congress of the United States has made appropriations for the use of the Federal Oil Board in carrying out the duties delegated to it by the President. Fifty thousand dollars was appropriated in 1925 (43 Stat. L. 754); fifty thousand dollars was appropriated in 1926 (44 Stat. L. 310); fifty thousand dollars was appropriated in 1927 (44 Stat. L. 1075); fifty thousand dollars was appropriated in 1928 (45 Stat. L. 882); fifty thousand dollars was appropriated in 1929 (45 Stat. L. 1626); seventeen thousand two hundred twenty dollars was appropriated in 1930 (46 Stat. L. 235), and twenty thousand dollars was appropriated in 1931 (46 Stat. L. 1362). In this letter of appointment, the President, at the very outset, observed: "It is evident that the present methods of capturing our oil deposits is wasteful to an alarming degree in that it has become impossible to conserve oil in the ground under our present leasing and royalty practices if a neighboring owner or lessee desires to gain possession of his deposits." The President, after pointing out that our petroleum resources are limited, stressed two basic considerations: *First*, that the national

security demanded adequate supplies of petroleum and its products; and, *secondly,* that American industry generally was supremely dependent upon gasoline, fuel, and lubricating oil. The President, in his letter, then continues: "For the purpose of giving this responsibility of government, in all of its aspects, the consideration it demands, I have constituted a Federal Oil Conservation Board, consisting of the Secretaries of War, Navy, Interior, and Commerce, to study the government's responsibilities and to enlist the full co-operation of representatives of the oil industry in the investigation. * * * I would express the desire that these conferences may be open and exhaustive. The oil industry itself might be permitted to determine its own future. That future might be left to the simple working of the law of supply and demand, *but for the patent fact that the oil industry's welfare is so intimately linked with the industrial prosperity and safety of the whole people,* that government and business may well join forces to work out this problem of practical conservation." (Italics ours.)

Immediately following the creation of the Federal Oil Board, that agency, in co-operation with the American Petroleum Industry, entered upon an exhaustive investigation of the petroleum conservation needs of the United States, and that investigation has proceeded from time to time since. At intervals since September 6, 1926, the Board has reported to the President upon this subject. Excerpts from the reports of the Board show the public aspect of the questions now before the court. In the report of the Federal Oil Conservation Board of September 6, 1926, addressed to the President, it is said: "There must be nat-

ural concern over our future supply of oil because of the manifest dependence of so large a part of our industrial life, national defense, and domestic comfort, upon continued adequate supplies of lubricants for all machinery and fuel for automotive engines. Our future resources in coal and iron have been so determined by geological evidence and exploration that we can measure our proved supplies by centuries. But the local character of oil deposits, their geographical uncertainty, and the vast amount of unproductive capital required for a long, advanced exploration, prevent any such advance proof in the case of oil. The very nature of all minerals, in that they do not reproduce themselves, of course, renders their extraction a depletion of assets. And, therefore, the resources of oil which are proven at any given moment cannot, from the nature of things, be otherwise than a reserve against current production. They do not imply future production of oil." (Report, Sept. 6, 1926, p. 5.)

After adverting to the fact that one-half of the country's oil production comes from about four per cent of the producing wells, namely, flush wells in new pools, this report continues: "However, this dependence upon fortuitous discovery of new fields renders it imperative that every effort should be made to secure the maximum amount of oil from the known fields" (p. 6). In speaking of the reservoir energy that chiefly produces oil, the Board observed: "The right of the state to prevent the waste of natural resources is rendered more important in this matter by the newly discovered, or at least more widely recognized facts, regarding the role of gas in the oil sand. Gas is more than

a commodity of smaller value associated with oil; it is the efficient agent provided by nature for bringing the oil within the reach of men. Dissolved in the oil, the gas makes the oil flow more freely to the well and there forces it upward, and the longer the gas is retained in solution, the larger is the recovery of oil. Waste of gas is therefore a double waste, and the impairment of the gas pressure in an oil sand by one owner may prevent his neighbors from recovering any of the oil beneath their land, and himself from securing more than a small part of the oil underlying his land" (p. 14). Among the recommendations made in this report was the following: "* * * And state legislation, with a declared purpose of conservation, should be enacted to stop the waste of gas, the loss of its content of gasoline, *and the even greater loss incident to reduction of gas pressure in the oil sands*" (p. 24, italics ours). In the second report of the Federal Oil Conservation Board filed with the President January 16, 1928, it is said: "This fact that new oil pools are being drilled and drained more rapidly than ever before simply foreshadows more sharply the ultimate fact that the time may come when substitutes for motor fuel may be necessary" (p. 2). The remainder of this report constituted an inquiry of the Board into substitutes for petroleum motor fuel.

The following excerpts are taken from the third report of the Federal Oil Conservation Board to the President, dated February 25, 1929: "The excess production commented upon by you when you created the Board in December, 1924, unfortunately continues" (p. 1). "* * * Larger proportions of the oil are being recovered from the sands;

the true function of gas in bringing the oil to the well and to the surface is being appreciated and utilized. And, perhaps best of all, is the definite trend toward co-operative methods in developing and operating new fields and in rejuvenating old fields. (p. 2.) * * * Fortunately, for the public interest, the trend in operating policy of the stronger companies has been definitely in the direction of conservation; immediate development of a field no longer always follows its discovery; offset agreements have slowed developments in proved areas. Flush flow has been prorated to prevent falling of markets with consequent loss to producers both large and small, and the present shut-in production is of volume never approached in previous years. All this is accomplishment that affords the best evidence of the possibility of a high degree of self-regulation in the business of bringing oil to the surface (p. 2). * * * The possibility of unrestrained individual action in what should await regulated community action still remains a menace to the present stabilized rate of production. * * * This natural conflict in thought between the intense individualists and the forward-looking leaders, together with the present threat of competitive and intensive producing have prompted the Committee of the American Bar Association to draft legislation, later referred to in this report, invoking the police power of the state to regulate the correlative position of the parties in interest in conserving an irreplaceable and indispensable natural resource. Plainly, the essential factor in handling underground reserves of oil, admittedly the most economic form of storage, is full co-operation in unit (pool) control, whether by voluntary

agreement or by state enforcement (p. 3). * * * In line with a recognized need for uniform state legislation that might permit co-operative or unit development and operation of oil and gas pools for the purpose of preventing waste, the committee on conservation of mineral resources of the American Bar Association, Section of Mineral Law, has pursued the study and submitted its report supplemented by a draft of two laws for state enactment. One measure would legalize voluntary agreements for economic purposes and conservation by removing the obstacles imposed by state anti-trust laws; the other measure would provide for compulsory unit and co-operative development and operation by invoking the police power of the state. * * * Your Board regards this report from the Committee of the American Bar Association as of such present significance and permanent value that its inclusion here as Appendix "b" (p. 26) is fully warranted." (p. 4)

In the last report of the Federal Oil Conservation Board made to the President that is available to us (Report IV of the Federal Oil Conservation Board to the President of the United States, May 28, 1930), it is said: "It matters not whether the oil reserves of the United States are five times a billion barrels or twenty times a billion barrels, *the supply is limited and cannot be increased.* Even the most generous estimates place the date at which our oil reserves will be practically depleted *under present rates of consumption in the comparatively near future.* In the interests of national defense and industrial prosperity, t h i s generation should not be permitted to waste this irreplaceable natural product and thus serious-

ly handicap future generations of America." (p. 8, italics ours.) The Board then proceeded to stress the importance of gas energy and to condemn the intense and competitive drilling and operation of the separate tracts in an oil pool as a practice inimical to the correlative rights of the owners in the pool and to the public interest. It is said: "There has also been a widespread realization of the importance of natural gas in its function as a propulsive agent in the production of oil (p. 15). * * * The natural unit in oil deposits is the single pool, large or small, and unit operation is in essence nothing more or less than accepting nature's decree and seeking to work in harmony with it (p. 18). * * * Over-production of any commodity is uneconomic and if it involves depletion of a supply that cannot be replaced, over-production and the consequent wastefulness effect a permanent injury. Especially is over-production in the oil business a *public menace* by reason of the unnatural and unfair competition between co-owners within the same natural unit. It is this individualistic strife characterized by haste and waste that has been a large factor in inciting over-production in the past (p. 18, italics ours). * * * The co-operation implied in the unit operation plan thus makes far more rational production than the present uneconomic drilling and pumping, but this co-operation within the pool *does not preclude competition between pools or fields.* The community of interest and action involved in unit operation stops at the natural boundary of the oil pool (p. 19, italics ours). * * * The unit idea in producing oil is bound to win out because the natural unit is the oil pool. Man may draw property lines on the

surface making a checkerboard for title searchers and lease lawyers to play on, but nature has fixed a boundary line around the underground deposit for geologists to discover and engineers to use in the development of the hidden resources. The unit operation plan is a back-to-nature movement. Codes of laws and judicial decisions relating to oil deposits have accorded to the surface checkerboard a sanctity beyond its deserts, while the facts of nature *as now known,* have received little attention and have commanded less respect (p. 19, italics ours). * * * Of more recent date than the general understanding of this underground movement of oil, after drilling has started, is the *tardy realization* of the function that gas plays in winning oil for the use of man. The natural gas associated with the oil in the pool largely determines its mobility and controls its movement to the well and to the surface. Deplete this gas supply and reduce the pressure, and recovery of some part of the oil content of the pool becomes more difficult, or even impossible, and to that extent the other owners are deprived of what is rightfully theirs (p. 21, italics ours). What is needed now to effect this conservation movement is specific recognition by the courts of this community of interest, by all the land owners in the content of the oil and gas pool, in the oil and gas as separate marketable commodities, *and in the energy in the gas, the pressure so easily dissipated, but so essential to an adequate recovery of the oil included in the minute pores of the sand, or sandstone, that forms the reservoir.* It is this loss of pressure which profits no one and damages all that takes on the character of a legal nuisance against which owners in the common reser-

vior should be protected. *Impairment, or loss of the natural agency that controls the 'reduction to possession' of the oil beneath the surface of the proprietor's land is in effect taking his property* (p. 22, italics ours). * * * The difficulty in putting the plan into effect is the large advantage that *a single owner of a small surface holding may now seize for himself under the rules of the game as at present supported by a well-aged judicial opinion.* Repeatedly, proposals for agreements between property owners to promote the efficient and economic handling of their common property in protection of their mutual rights have been vetoed by a small minority of the parties in interest. *For these reasons the Federal Oil Conservation Board early urged the formulation and adoption of remedial measures permitting a better correlation of underground property rights.* Some affirmative action by either court or legislature, whereby the co-equal rights of all the owners may be recognized and protected, is sorely needed, *and this regulatory action may well be predicated on the magnitude and gravity of the public interest involved.* The principle of justice between owners would seem to be incentive enough, but if more grounds for action are required, good technology and good economics amply justify the acceptance of unit operation as in the public interest'' (p. 23, italics ours).

The solicitude of the President regarding our future supply of petroleum, as expressed in his letter constituting the Federal Oil Board, the exhaustive investigations of that Board by reason of the responsibility assigned to it, its reports embodying its conclusions and recommendations based upon its investigations, and the sanction of Congress,

as manifested by the appropriations for the use of the Board, indubitably point to the announcement of a new national public policy of supreme concern to all the people of the United States. That policy, from the viewpoint of the public interest, finds its absolute vindication in the following propositions, drawn from the letter of the President and from the excerpts from the reports of the Federal Oil Conservation Board already set forth:

(1) Petroleum is an irreplaceable natural resource.

(2) This being true, our supply for future use, whether great or small, is necessarily limited.

(3) We cannot determine the extent of our future supply as we may do and have done in respect of the solid minerals. New discoveries will be fortuitous. The quantity of oil that may be recovered from existing fields is uncertain, and the quantity that may be recovered from new fields is shrouded in even greater uncertainty.

(4) The foregoing considerations reveal their complete significance when we add thereto two further facts. An adequate supply of petroleum and petroleum products is indispensable to the national security, and equally so to our whole industrial fabric, and to the welfare of the people in their economic and social life. This phase of the case is stressed by the President and it is repeatedly emphasized in the utterances of the Federal Oil Conservation Board.

(5) Based upon the considerations above mentioned, the President, in his letter, and the Federal Oil Conserva-

tion Board throughout its reports, emphatically voice the alarm these high officials feel regarding the possibility, if not the probability, of a petroleum shortage in this country in the comparatively near future.

(6) From the above, logically it follows that it should be the public policy of the United States to conserve the petroleum resources of our country. Our petroleum reserves should be drawn on as needed, but every kind of waste incident to the production of oil should be prohibited to safeguard, to the extent possible, our supply for the future.

(7) The kind of waste now generally occurring in the business of producing oil which the Federal Oil Board in its several reports consistently explains and condemns is the waste or inefficient use of the gas energy of the oil pools of the country. The force that lends mobility to the oil propels it to the well opening and lifts it to the surface for beneficial use. It is pointed out that the waste or inefficient use of gas energy leaves oil in the ground that should be recovered through the proper and non-wasteful utilization of the gas energy.

(8) The Board, as a corollary to the above proposition, finds (and scientific opinion in the oil industry supports that finding abundantly if not universally) that the gas pressure or energy in an oil pool, by reason of its essential nature, functions in respect of the pool as a whole and not in respect of the separate surface holdings into which the pool may be divided. Where the gas energy is permitted to function as nature intended,

and where the operation is efficient and without waste, the percentage of oil recovery is infinitely greater than when each operator, through his own tract within the pool, seeks to gain as much of the oil of the pool as possible, which is but another way of saying that he gains a disproportionate share of the gas energy for his own oil producing purposes, a practice almost invariably attended by the improper use and waste of the gas energy.

(9) Whatever the holdings of the American courts may be regarding the ownership of oil and gas in place, or the exclusive right of a surface proprietor through wells on his own land to capture all the oil and gas that may be produced therefrom, regardless of the effect on the neighboring proprietors, it is only in the very recent cases involving the constitutionality of conservation statutes that the full significance of the pool function of gas energy has been pressed upon the courts. The Federal Oil Board, in advancing the cause of petroleum conservation in the public interest, takes the position that the pool effect of gas energy calls for the laying down of a new legal concept based upon later scientific discoveries. This is by no means a novel procedure, especially where constitutional questions are concerned. The Federal Board has concluded that the gas energy of an oil pool, by reason of its general effect throughout the pool for oil producing purposes, is the common and not the individual property of the surface proprietors. The Board further concludes that if this community of ownership is once recognized distinct and

far-reaching correlative rights and obligations between and among the surface proprietors regarding the use or the waste of their common property necessarily will arise.

(10) It is because of the communal character of the gas energy in an oil pool that the Federal Oil Board reaches the ultimate conclusion that there is broad scope for the exercise of the police power of the oil producing states to adjust and regulate the correlative rights and obligations that result from this community ownership. IN PRESENTING THIS BRIEF IN THE PUBLIC INTEREST, OUR ARGUMENT WILL BE CENTERED UPON THE COMMUNAL NATURE OF GAS ENERGY AS A BASIS FOR THE EXERCISE OF THE POLICE POWER OF THE STATE OF OKLAHOMA AS EVIDENCED BY THE STATUTE CHALLENGED BY THE APPELLANTS IN THIS CASE.

Having thus outlined the national public policy that is involved in the questions presented in these cases, that policy must be correlated with the public policy of the oil producing states so that the application of the Oil States Advisory Committee for leave to file this brief shall find its justification upon the ground of public interest. In the broader sense, the national public policy and the public policy of the oil producing states in respect of regulating the production of oil to prevent waste are identical. The Federal Oil Board, in its first report, clearly discerning the division of governmental power between the nation

and the states, and doubting the power of the federal government to regulate the production of oil from lands privately owned in the states, declared that the exercise of state power was preferable. (Report I, Federal Oil Conservation Board, September 6th, 1926, page 15.) In the same report, the oil states are not only urged to enact conservation statutes, especially designed to prevent the waste of gas energy, but the several oil producing states are also urged to co-operate among themselves and with the federal bureaus to this end (p. 5). In December, 1927, the Federal Oil Board appointed a Committee of Nine, consisting of three federal government representatives, namely, the Assistant Secretary of the Interior, the Assistant Secretary of Commerce, and the Chairman of the Federal Trade Commission, three former presidents of the American Petroleum Institute, and three members of the American Bar Association, nominated by the Mineral Section of that body, with the approval of the American Bar Association, to assist the Federal Oil Board in its investigation of the practical and legal problems of petroleum conservation. This report was filed with the Federal Oil Board January 28, 1928, and among the recommendations made was the study of state legislation to prevent gas waste. This report was referred to the governors of the oil producing states by the Federal Oil Conservation Board. (Report III, Federal Oil Conservation Board, Feb. 25, 1929, pp. 4-9-17).

Doubtless influenced by the appeal of the Federal Oil Board and motivated also by his own knowledge of the waste of our petroleum reserves, Governor William H. Murray, of Oklahoma, called a meeting of the governors of

certain oil states, or their representatives, to be held at Fort Worth, Texas, March 1, 1931, looking to co-operation among the oil producing states for conservation. This meeting was attended by Governor Murray of Oklahoma, Governor Sterling of Texas, the conservation officers of Oklahoma and Texas, and the representatives of the Governors of Kansas and New Mexico. From this meeting came the organization of the Oil States Advisory Committee at Texarkana, Texas, March 9, 1931, the Governors of seven oil producing states, namely, Oklahoma, California, Kansas, Wyoming, Louisiana, Arkansas, and Texas, having appointed representatives on said Committee. Later, the Committee was enlarged to include representatives of the Governors of the States of Ohio, New Mexico, and Colorado. Since the Committee was fully constituted, it, in co-operation with the Federal Oil Conservation Board and the conservation authorities of the states represented on the Committee, has labored to advance the cause of petroleum conservation throughout the United States, and in particular in the states represented upon the Committee.

In the meanwhile, by act approved March 16, 1931, the Kansas legislature adopted an act prohibiting the production of crude petroleum in such manner and under such conditions as to constitute waste, and the term "waste" was defined so as to include underground waste, and waste of gas energy. Where oil could be produced only under conditions constituting waste, ratable taking from the pool affected was provided for (Kans. S. L. 1931, pp. 332-333). By act approved June 4, 1931, the California legislature prohibited the production of crude petroleum in the State of

California in such manner and under such conditions and in such amounts as to constitute or result in waste. The waste prohibited, as defined in section 2 of the act, was as follows:

> "*Sec. 2.* The term 'waste' as used herein shall include underground waste or destruction without beneficial use, surface waste or destruction without beneficial use, waste by reduction of the total quantity of recoverable crude petroleum oil in any underground source of supply by the careless or improper drilling or operation of wells, and the waste incident to or resulting from the production of crude petroleum oil when the current production together with the amount of crude petroleum oil and/or its refined products in storage exceeds the current requirements for use within and for shipment to points without the state, and for the maintenance in storage of such reserves of crude petroleum oil and/or its refined products as are reasonably necessary to meet and insure the continuity of an adequate supply of crude petroleum oil and/or its refined products for such current requirements as determined upon the basis of past experience, existing conditions and estimated future requirements of crude petroleum oil and its refined products for such use and shipment. The loss by evaporation or leakage and the increased hazard of loss from fire and other causes resulting from the storage of crude petroleum oil and/or its refined products in excess of the quantities which are reasonably necessary to insure continuity of an adequate supply for such current requirements is waste within the meaning of this act." (Statutes and Amendments to the Codes of California 1931, pp. 1267-1272, inc.)

By act approved August 12, 1931, the Texas legislature enacted a conservation statute providing that neither nat-

ural gas nor crude petroleum shall be produced, transported, stored, or used in any such manner, or under such conditions as to constitute waste. This provision was followed by this language:

> "As used herein, the term 'waste,' in addition to its ordinary meaning, shall include the operation of any oil well, or wells, with the gas/oil ratio exceeding that fixed for such well, or wells, by order of the Commission, and the Commission is hereby given authority to fix and determine by order such ratio. *(g)* Actual physical waste incident to or resulting from so drilling, equipping, *locating, spacing,* or operating wells *as to reduce or tend to reduce the ultimate total recovery of crude petroleum, or natural gas, from any well or pool. (h)* Waste incident to or resulting from the unnecessary, inefficient, excessive, or improper use of the gas, *gas energy,* or water drive in any well or pool. * * * *(k) Waste incident to the inequitable utilization of gas energy,* water drive, or other natural force resulting from the inequitable withdrawing from any common pool; *provided, however,* that the Commission shall only invoke this definition of waste for the purpose of preventing discrimination in production as between producers disposing of their oil and/or gas by means of regulated carriers and those producers disposing of their oil and/or gas by means of unregulated carriers." (Sec. 1, Ray's Advance S. L., Texas, Vol. 5, pp. 42-43, italics ours.)

By section 7 of the act, the Railroad Commission of Texas is given the power to establish rules and regulations to prevent the kind of waste condemned by the act and, here the further provision occurs:

> "If it is the judgment of the Commission that any reduction or adjustment in the production of oil or

gas from any well or pool is necessary in order to prevent the waste, as herein defined, of crude petroleum, or natural gas, from any such well, or pool, the Commission shall determine how to accomplish such reduction or adjustment, and such order shall be made in such manner as to distribute, prorate or otherwise apportion such reduction, or adjustment, among the wells committing such waste, or contributing thereto, as the facts justly and equitably require." *(Id.*, p. 46.)

The Oklahoma statute assailed here prohibits the ordinary waste of petroleum, the underground waste thereof, and the waste incident to the production of petroleum in excess of transportation and marketing facilities or reasonable market demands. The California statute, already referred to, with unimportant distinction, looks to the accomplishment of this same purpose. On the theory that the waste of gas energy constitutes perhaps ordinary waste, and certainly underground waste, and waste incident to the production of oil in excess of transportation and marketing facilities and reasonable market demands, the Kansas and Texas statutes, particularly the latter, with its nice treatment requiring non-wasteful and equitable use of gas energy, may be analogized to the Oklahoma statute challenged here, and hence, it comes about that the appellant's assault of the Oklahoma statute challenges also the constitutionality of the latest effort made by the three important oil producing states of Kansas, California, and Texas, to prevent waste and to conserve the vast oil resources of these states for the benefit of the American people.

In short, these cases, if not sustained, either will strike down or seriously impede the carrying out of our national

conservation policies, the efforts of the oil producing states in the same direction, and the conservation statutes of the four most important oil producing states in the American Union—states now producing 86.48 per cent of the nation's supply of crude oil, as shown by the latest figures of the Bureau of Mines. (American Pet. Institute Bulletin, Feb. 27th, 1932.) It is because of these things that the Oil States Advisory Committee, at a meeting held in Chicago November 12th, 1931, by resolution, delegated to the legal subcommittee of the Oil States Advisory Committee the duty of filing a brief on behalf of the Committee *amici curiae*, the counsel filing this brief being the Oklahoma member of the Oil States Advisory Committee, and the lawyers of counsel being respectively the Colorado and the Ohio members thereof.

(c) Statement of the Case.

Counsel for appellant, in their brief, have stated the case rather fully, but clearly from their point of view of the applicable law. Counsel for appellees have submitted a counter statement, controverting appellant's statement in certain particulars and supplementing it in others. In the circumstances, and to serve as a more impartial recital of the record, we propose to restate the case and for the sake of clearness to divide it into three parts.

(A) The Relative Situation of the Parties: Appellant is a New Mexico Corporation, authorized to do business in Oklahoma. The principal appellees, Walker, Childers, and Hughes, are members of the Oklahoma Corpora-

tion Commission. (R. Vol. 1, part 2, p. 177.) While the parties last named are the formal defendants, the inescapable fact remains that back of the defendants are fifty-two oil operators in the Oklahoma City field who are obeying the restraint orders that are assailed by the appellant here. Appellant claims that the Oklahoma Conservation Law and the restraint orders of the Oklahoma Corporation Commission made thereunder, are unconstitutional and void in that they violate the Fourteenth Amendment and the Commerce Clause of the Federal Constitution. Appellant asks that the appellees, on these grounds, be enjoined from enforcing the act and the orders made thereunder. (R. Vol. 1, part 1, p. 35.) Appellant is what is termed an integrated oil concern. It produces and transports crude petroleum by pipe line, refines it, and markets the products of its refinery in intrastate and interstate commerce, the larger quantity of its refined products going into interstate commerce. (R. Vol. I, part 2, p. 178.) At this stage, an observation that penetrates appellant's whole case must be drawn. Appellant, in the main if not entirely, predicates its case upon its integrated character. It combines its producing, transporting, refining and marketing departments into a single enterprise and complains that, as a single enterprise, it is deprived of its property without due process, and that the Oklahoma Conservation Law and the orders of the Corporation Commission made thereunder offend the Commerce Clause. Such is not the predicament of this case. The Oklahoma Conservation Act and the orders of the Corporation Commission challenged here apply to a single branch of the petroleum business—that of producing oil. So

far as the record here is concerned, appellant occupies the position of a producer of oil, and that alone. All of its other business activities must be disregarded. So far as the record in this case is concerned, appellant's business falls into a single category, that of producing oil, a matter of local and not of national significance.

Appellant holds oil leases in the town-lot section of the Oklahoma City oil field on twelve non-contiguous tracts. The smallest covers .16 of an acre. Two others cover one-half acre tracts. The largest tract covers five acres. The area of the remaining tracts ranges between the two extremes here indicated. (R. Vol. I, part 2, pp. 179-180.) At the time of trial, appellant had nine producing wells on these tracts and was drilling another, the average well location covering three and a half acres. (R. Vol. I, part 2, pp. 179-181.) Standing in sharp contrast with the small holdings and intensive drilling operations of appellant, when correlative rights are taken into account, is the fact that the Oklahoma City field covered 10,000 acres of productive territory (R. Vol. I, part 2, p. 346), and that at the time of the trial below there were 746 producing wells in the Oklahoma City field. (R. Vol. I, part 2, p. 184.) In other words, the average well location in the Oklahoma City pool, after taking into account appellant's small locations, was over 10 acres to the well. Of even more compelling significance, when the producing activities of the appellant and the other operators in the Oklahoma City field are brought into contrast, are these facts: The estimated oil content per acre of appellant's McCalep No. 1, located on a tract less than one-half acre in area, was 33,000 barrels.

In less than one year, namely, from September 30, 1930, to June 25, 1931, this well produced 254,509.26 barrels; in other words, about sixteen times the estimate of recoverable oil per acre in that locality. Appellant's Naden No. 1 was drilled on a tract of one-half acre in area, and the amount of recoverable oil per acre attributed to the locality was 27,000 barrels. In five months preceding the trial, this well had produced 225,913.04 barrels, or something less than eighteen times the quantity attributed to this well. Seal No. 1 and No. 2, belonging to the appellant, were located on a five-acre tract. The first of these wells had an estimated recovery per acre of 13,000 barrels and the second a recovery of 7,500 barrels per acre. In the four months preceding the trial, these two wells produced in excess of 157,000 barrels. At the time of the trial, all of these wells were yet capable of producing large quantities of oil. The history of appellant's other wells, the estimated recovery per acre, and the quantity of oil actually produced therefrom, does not appear in the record. (R. Vol. I, part 2, pp. 181-182.)

In the period preceding the trial, appellant had taken 300,000 barrels of oil from the four wells above mentioned in excess of the quantity it was permitted to produce under the orders of the Corporation Commission. (R. Vol. I, part 2, p. 182.) From these considerations, it follows that appellant had taken large quantities of oil from lands not belonging to it and had used the gas energy of the oil pool, to which it had access, in a wholly disproportionate manner to produce this excessive quantity, and that, aside from the natural equities between it and its neighbors resulting

from the circumstances just mentioned, it had produced 300,000 barrels of oil from its wells above the limitation of the Corporation Commission orders, all to the serious detriment of its neighbors in the Oklahoma City pool, to whom it owed reciprocal and correlative obligations not only in respect of the oil to be recovered, but in respect of the gas energy that had to be utilized to produce the oil.

(B) ORDERS OF THE CORPORATION COMMISSION: As the taking of property without due process always raises the degree of regulation and restriction, the first point to observe as shown by the record is the limited period within which the orders of the Corporation Commission complained of by appellant were operative. They were not only limited to the brief period of three months each, but provision was made for a re-adjustment of the limitation within the three months' period should new evidence show that the demand had been increased. (R. Vol. I, part 2, p. 97; R. Vol. I, part 2, pp. 112-116; R. Vol. I, part 2, pp. 138, 145-146; R. Vol. I, part 2, pp. 161-162; R. Vol. I, part 2, pp. 173-179.) As the order of June 30, 1930, fairly is typical of all the other orders attacked by appellant, the substance of this order will be here given. The order begins: "Comes now Wirt Franklin, petitioner herein, by his counsel, and this matter being set for hearing on this date, and the Commission having heard and considered the evidence of the petitioner, *and the evidence of any and all persons interested in said petition, and being advised in the premises, finds as follows:* (Italics ours.) (R. Vol. II, part 2, p. 85.) * * * That due notice of the hearing had been given. (R.

Vol. II, part 2, p. 86.) * * * That there is an over-production of crude oil in the State of Oklahoma attended by waste of gas and of gas pressure, and that the producers of crude oil * * * unless restrained, * * * (will) commit physical waste of crude oil, economic waste, under-ground waste, surface waste, and waste incident to the production of crude oil in excess of transportation or marketing facilities, or reasonable market demands. (R. Vol. II, part 2, p. 86.) * * * That in order to curtail the production of crude oil in Oklahoma, in a manner to prevent the commission of waste, it will be necessary to enforce proportionality of taking from the wells and leases in the flush and semi-flush pools, and unless proportionality is required, injustice would be done as between producers in the same pool * * * in that drainage would occur from one lease to another and undue proportion of the gas pressure would be utilized by some operators to the detriment of the others. (R. Vol. II, part 2, pp. 87-88.) * * * That the potential production of crude oil from existing wells in Oklahoma on and following the first day of July, 1930, will be approximately 1,362,000 barrels per day, and that the daily demand from Oklahoma is and will be approximately 650,000 barrels per day during the months of July, August, and September, 1930. That, therefore, there is an excess of potential production over consumption of 712,000 barrels per day, which cannot be produced without waste, as defined by the Statutes of Oklahoma." (R. Vol. II, part 2, p. 88.) The Commission found that a different percentage of reduction should be applied to the several oil pools brought under the order. (R. Vol. II, part 2, pp. 89-90.) That the wells of

small settled production should not be limited because to do so would cause the abandonment of thousands of them, thus causing the waste (economic waste) of a valuable natural resource. (R. Vol. II, part 2, p. 92.) That the application of different percentages of reduction was necessary because the several pools subjected to the order possessed their peculiar and separate markets. (R. Vol. II, part 2, p. 92.) That the varying percentages of reduction were necessary to prevent discrimination between and among the pools subject to the order. (R. Vol. II, part 2, p. 93.) Upon the basis of these specific findings, the Corporation Commission, by its rules and regulations, and in the order embracing the findings, put the findings into effect as a restraint upon production to prevent waste. (R. Vol. II, part 2, p. 95.)

Especially illuminating on the sheer matter of waste as the basis of the orders attacked is the opinion of WALKER, Chairman, in the Order of February 10, 1931 (R. Vol II, part 2, p. 190). Upon the matter of economic waste, the Commissioner said:

> "Economic waste, so far as this hearing is concerned, is too closely allied to physical waste to permit intelligent severance therefrom. Thus, one of the protestant's chief objections to increasing the allowable takings from the Oklahoma City field is based on the claim that such increased takings would tend to absorb markets which are now caring for the small, or so-called stripper wells, generally estimated at from 30,000 to 60,000 wells in the State of Oklahoma, dependent upon the definition of a stripper well, and the amount of crude petroleum that would designate a

well within that class. In any event, it is contended that a flood of oil from the Oklahoma City pool would disastrously affect some 60,000 wells in the state, outside the Oklahoma City pool, and would close many of them down for a long time, and that during this time these wells would, because of water and other damage, become in such condition that their operation would no longer be practical. This would constitute both physical and economic waste, physical in the sense of the destruction of valuable properties both to individuals and to the state, and economic, in the destruction of these properties and coincident injuries connected therewith, not only to the wells themselves, but to the state and its people." (R. Vol. 2, part 2, p. 194.)

In the same opinion Walker observed:

"Another, and an exceedingly important problem directly connected with the question of physical waste, but also bearing upon the question of economic waste and the ultimate recovery of the field (underground waste), is the question of natural gas wastage in connection with the production of crude petroleum. A witness, a competent petroleum engineer, testified that if the wells in the Oklahoma City field were opened to ten per cent capacity daily flow (under this order they were opened to a lesser flow) assumably based upon the Commission's estimated potential in its Order No. 5413, of nearly 6,000,000 barrels, there would be a production in the Oklahoma City field of approximately one and one-half billion cubic feet of natural gas, *the greater proportion of which would be blown into the air and dissipated.* (Italics ours.)

"Involved in this wastage of natural gas to an extent which to the layman's mind seems criminal and which to any mind ought to be conceded to be improvident, is the question of the *destruction of gas energy,*

the potent and necessary element or power in the recovery of crude petroleum. Oklahoma City wells are exceedingly deep, generally producing crude petroleum from a depth below 6500 feet, and the gas energy so necessary to their production, once dissipated, cannot be restored. The relationship of wastage of natural gas from these wells and the allowable takings of crude petroleum from the wells is an important and necessary one. We should not permit unlimited flow from these wells until we can be convinced that the natural gas energy is being conserved to the best advantage." (R. Vol. 2, part 2, pp. 195-196.) (Italics ours.)

(C) FINDINGS OF THE COURT BELOW. That each of the orders attacked by appellant was entered upon the proper application by petition of some interested person; the application was set for hearing, of which due and reasonable notice was given to all persons and classes interested therein, as provided in section 6 of the act; testimony was taken at the hearings on said applications, and the findings of fact upon which the regulations were based were made upon the evidence introduced at the hearings. The evidence taken by the Commission upon the various hearings was not introduced in evidence in this suit except an abstract of that part of the evidence taken at one of the hearings on the question of waste. *The abstract of the evidence before the Commission so introduced sustained the findings of fact thereon.* The allegations of the third amended and supplemental bill of complaint that the several orders complained of were entered and promulgated by the Commission without having heard the testimony of witnesses under oath, without having heard any sort of legal evidence upon which

to base said orders, and the findings of fact *were not supported by any evidence before it,* are not sustained by the evidence herein (R. Vol. I, part 2, p. 190). (Italics ours.)

That applicant owns a pipe line of 18,000 barrels a day capacity, running from its Oklahoma City properties to its Enid refinery. * * * There is no evidence that closing in, or pinching in wells in the Oklahoma City field will cause water to enter the oil and gas sand, or damage appellant's wells, or results in waste of oil or gas (R. Vol. I, Part 2, p. 182). * * * That to permit oil wells in flush or semi-flush pools to flow wide open for a considerable length of time results in the use of an excessive amount of gas pressure and uneconomic and wasteful use of gas energy in recovering and lifting the oil, and a tremendous loss in ultimate recovery. * * * The proper and economic utilization of this gas energy is of particular importance in a pool such as the Oklahoma City pool where the wells are of tremendous depth and the cost of artificial recovering and raising the oil will be unusually great (R. Vol. I, part 2, pp. 185-186). * * * That the orders of the Corporation Commission regarding the preservation of natural gas and gas pressure are established by the evidence (R. Vol. I, part 2, pp. 197-198). * * *

That the full production from the Oklahoma City field on the date of said order (October 28, 1930), and during the period of time covered thereby, and since then, and at this time, could not and cannot be produced without waste, including physical waste and waste incident to the production of crude oil or petroleum in excess of the reasonable market demand for oil therein and that in said order and

subsequent orders the Commission restricted the market demand for oil therein as then ascertained to exist and that the present restriction of the production of oil therein conforms to the amount of the reasonable market demand for oil produced therefrom (R. Vol. I, Part 2, p. 198). * * * That the Commission adjusted any inequalities in the orders which are challenged here (R. Vol. I, Part 2, p. 199). * * * That the time basis of proration in effect in the Oklahoma City field for a time was adapted to the circumstances of said field * * * (R. Vol. I, Part 2, pp. 201-202, 204). That the Commission, in none of its orders, has discriminated against the Oklahoma City pool in favor of any other prorated area (R. Vol. I, Part 2, p. 207). * * * That the varying percentages of limitation were justified because each pool had a different market (R. Vol. I, part 2, p. 207). * * * That none of the orders of the Corporation Commission have been made or entered into for the purpose of fixing or maintaining the price of crude oil (R. Vol. I, part 2, p. 209).

The following finding of the court below is inserted in full. It reads:

> "There was introduced in evidence an agreed narrative statement of the evidence before the Commission on the subject of waste. We find from said narrative statement that it was proved to the Commission and well established that the commission of both surface waste, underground waste, and waste incident to the production of crude oil in excess of reasonable market demands, would have occurred in each of the prorated pools in the absence of the making of the proration orders, and rules and regulations herein attacked by the plaintiff for the prevention of such wastes. We

find that the evidence before the Commission on the subject of waste clearly establishes that the commission of such wastes was immiment." (R. Vol. I, part 2, p. 210.)

• • • That the orders of the Corporation Commission ~~prohibiting~~ permit the flowing of wells in the Oklahoma City field open and continuously would cause serious underground waste. • • • This is also established by the evidence (R. Vol. I, part 2, p. 197).

On the question of inequality between the appellant and the other operators in the Oklahoma City field, the court below found that fifty-three different corporations and individuals were operating in the field, thirty-six of which were non-integrated, that is, entirely dependent on outside purchasers for a market, and eight were partially integated, therefore, partly dependent on outside purchasers for a market. Only nine of the fifty-three producers in the field were in the class of the appellant. They were in position to market all of their production, were it not for the restraint of the orders of the Corporation Commission. Thus, nine producers of the Oklahoma City pool owning 12 per cent of the wells therein and 10 per cent of the production therefrom, due to their peculiar situation, when that term has no meaning under the record of this case, could take advantage of the other forty-four producers owning 88 per cent of the wells in the field and 90 per cent of the production therefrom (R. Vol. I, part 2, p. 183).

The foregoing, in our opinion, states the record in its true perspective. The appellant is intent on serving its selfish interests, regardless of the effect of its action upon

its fellow-operators. To it, the Fourteenth Amendment is a sword, and not a shield. The subject-matter of the suit is property of a character that, by its very nature, establishes correlative rights and obligations among the producers in the same oil pool, if there is such a concept within the realm of American law; a legislative edict was enacted within the broad sphere of the police power designed to adjust and regulate these correlative rights and obligations, and an administrative body midst all the complexities the subject implies seeks to administer the law in order that equality and justice might be upheld; and, finally, a federal court of three judges, sitting in the atmosphere of these things, hearing testimony of the witnesses directly, and upholding in every important respect both the act and the orders of the Oklahoma Corporation Commission. In this setting, we shall proceed to the argument of the legal questions that are presented.

SUMMARY of ARGUMENT.

Point 1. Proper interpreation of the Oklahoma Conservation Act (Oklahoma Session Laws 1915, p. 28).

Point 2. When so interpreted this act does not offend the due process clause of the Fourteenth Amendment,—the equality and liberty of contract phases of appellant's contention under this heading will not be discussed.

Point 3. Section 2 of the Oklahoma Conservation Act, the price-fixing provision, clearly is separable from the waste provisions of the act, namely: Sections 1, 3, 4 and 5, which alone are material to this controversy.

Point 4. There is no such uncertainty in respect of the meaning of the terms "waste," "underground waste" and "waste incident to the production of crude oil and petroleum in excess of transportation or market facilities or reasonable market demands" as these terms appear in section 3 of the act as to render the act void on that ground.

Point 5. There was no delegation of legislative power by this act. The legislative prohibitions are clear and certain and the power conferred upon the Oklahoma Corporation Commission by the act was that of applying the standards of waste as established by the legislature to the peculiar facts of a case. In short, an administrative duty, nothing more, was imposed upon the Corporation Commission by the Oklahoma Conservation Act.

Point 6. The rules, regulations and orders of the Oklahoma Corporation Commission assailed by appellant here as unconstitutional and void clearly are within the provisions of the Oklahoma Conservation Act; hence it follows that all such proceedings of the Commission are immune from attack.

Point 7. The duties committed to, or discharged by the Proration Umpire and Operators' Committees, under the direction of the Oklahoma Corporation Commission, do not have the effect of invalidating the rules, regulations and orders of the Commission complained of by appellant in this case.

Point 8. Neither the Oklahoma Conservation Act, nor the rules, regulations or orders of the Oklahoma Corporation Commission made thereunder, the subjects of assault here, offend the commerce clause of the Federal Constitution.

ARGUMENT.

POINT 1.

Proper interpretation of the Oklahoma Conservation Act (Oklahoma Session Laws 1915, p. 28).

As this brief proceeds, it will be demonstrated that the rules, regulations and orders of the Oklahoma Corporation Commission challenged in this suit by appellant exclusively are based upon the waste provisions of the Oklahoma Conservation Act (Oklahoma Session Laws 1915, p. 28). Appellant, however, strains to connect section 2 of the act, a price-fixing provision, with the sections of the act dealing with waste, and upon that foundation much, if not all, of its case depends. We propose to interpret the waste sections of the act first to show that they, taken together, manifest a single legislative design and purpose. We shall then take up section 2 of the act, the price-fixing provision, to demonstrate that it has no connection whatever with the waste sections; that section 2 and the waste sections are not in any wise interdependent, but, on the contrary, that section 2, in its turn, manifests a legislative intent entirely separate and distinct from the prohibition of waste.

Having thus outlined our objective, we shall analyze the material sections of the statute. Section 1 provides:

> "That the production of crude oil or petroleum in the State of Oklahoma in such manner, *and under such conditions* as to constitute waste *is hereby prohibited.*" (Italics ours.)

This prohibitory section of the Oklahoma Conservation Law was followed exactly in the Kansas Conservation Law (Kans. S. L. 1931, p. 332). In California, by an act adopted after the Oklahoma act, the Oklahoma model was employed, but more comprehensive language used. Here the production of crude petroleum in the State of California in such manner, and under such conditions, and in such amounts as to constitute or result in waste, was prohibited. (Statutes and amendments to the Code of California 1931, p. 1267.) The Texas act also adopted after the Oklahoma act provided that neither natural gas nor crude petroleum shall be produced, transported, stored or used in any manner or under such conditions as to constitute waste. (Ray's Advance S. L. Vol. 5, p. 42.) Hence we have the impressive fact that in the main the prohibitory section of the Oklahoma act has been carried into the statutory law of three other oil producing states. The condemnation of waste in section 1 of the Oklahoma act is all-~~inclusive~~ inclusive. At a glance, the production of petroleum in Oklahoma in such manner as to constitute waste would forbid all kinds of waste, but the statutory intent went decidedly farther. The production of petroleum under conditions that brought about waste was likewise prohibited. This latter phrase is of high significance. Prohibiting production in such a manner as to cause waste would satisfy all the mechanical requirements for conservation, but another factor was added. Conditions existing at the time the oil was produced, that is, extraneous conditions, were to be taken into account, and if the production, plus these conditions, constituted waste, then that kind of waste was prohibited. At least, this much

must be conceded. Where the two concepts, manner of production and conditions at the time of production, are both established as standards to determine the existence of waste, the statute in the very nature of things must be given the very broadest application. This brings us to the related section dealing with waste, namely, section 3:

> "That the term 'waste' as used herein, in addition to its *ordinary meaning* shall include economic waste, underground waste, surface waste and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities, or reasonable market demands. The Corporation Commission shall have authority to make rules and regulations for the prevention of such waste and for the protection of all fresh water strata and oil and gas bearing strata encountered in any well drilled for oil."

We must arrive at the applicable meaning of this definition section by process of elimination. The Oklahoma legislature must be presumed to have enacted its conservation act in the light of the underground nature and habits of oil and gas, and of their physical association and relationship underground. This court also must take judicial knowledge of these conditions. Beginning our process of elimination, first we shall deal with the concept, "Economic Waste." Under the clear terms of the act, the words, "economic waste" bear no direct relation to price or price-fixing. That subject, according to a complete code of its own, is dealt with in section 2 of the act, and there only. On the other hand, the term, "economic waste," does bear a relationship to overproduction by reason of the nature of the business of producing oil. The Federal Oil Board has

found that one-half of the nation's oil supply comes from the small wells of settled production which number over 300,000. There is a price level that determines the continued operation or the abandonment of these wells. Therefore, an acute and prolonged overproduction coming from flush and semi-flush fields that undermines the economic price which alone will sustain the operation of the small wells of the country, not only threatens, but actually brings about an abandonment of thousands of small wells, thus leaving in the ground oil that otherwise would be recovered. This is an outright economic waste, and while the concept has an indirect relation to price, its basic import is to sustain a condition that will save the small wells of the country which from every point of view constitute the backlog of our oil supply.

The term, "surface waste" doubtless would embrace these elements: *(a)* The actual dumping of produced oil on the surface without use. *(b)* The storing of produced oil in earthen receptacles, that is, in drains or ditches that were dammed for the purpose, or in excavations dug for the purpose which would result in the seepage of oil into the earth that never could be recovered for use. The deterioration of the oil thus stored through the high percentage of evaporation in respect of the more volatile and valuable content, and in time of heavy rains the overflowing of the earthen receptacles of whatever character upon the land or into neighboring streams with the actual physical loss of oil that would result. That these elements of waste had already been encountered by the Oklahoma Cor-

poration Commission, and that they were in the minds of the Oklahoma Legislature when the Conservation Act under consideration here was passed, clearly appears from appellees' brief. *(c)* The storage of oil above ground in steel tanks. At the time of the passage of this act, it was not the custom to make tanks of this character gas tight. It is doubtful if any gas tight steel tanks were in use in Oklahoma at the time. In these circumstances, a substantial loss of the lighter parts of the stored oil was inevitable. Now gas tight tanks are in very general use, but there is still a degree of loss by evaporation. The record is not clear regarding the extent of this.

The terms "ordinary waste" and "underground waste" are so related according to our theory of this case that they may be treated together. Plainly enough, the term "ordinary waste" would include the actual destruction before beneficial use of any article of economic value. As a corollary, the term equally should include failure to obtain for use an article of economic value. The case, as a matter of waste, becomes infinitely stronger when the failure to produce the article results in such a condition that it can never be recovered for commercial use. The term "ordinary waste" must have a relative meaning, and the above reasoning is strongly fortified when we remember that we are dealing with a natural resource that cannot be replaced, the supply of which is limited. Dealing then with the concept "ordinary waste" in its relative significance, we are brought to the function of the gas energy of an oil pool which, if wasted, or if inefficiently used, leaves oil in the ground that cannot be recovered, but which would

have been recovered by the non-wasteful and efficient use of the gas energy of the pool. In these circumstances, we think there is solid ground for contending that the waste, or inefficient use of gas energy, constitutes ordinary waste within the meaning of this act. But we are not obliged to rest our case here. Underground waste, as such, specifically is prohibited by the act. Now, what, in the sense employed here, does the term "underground waste" mean? It does not refer to the mechanical processes that should be employed for the protection of the saturated oil and gas formations when penerated by wells, because that kind of conservation expressly is taken care of in the last part of the section under consideration, and in the following language:

> "The Corporation Commission shall have authority to make rules and regulations * * * for the protection of all fresh water starta (a matter not related to oil) and *oil and gas bearing strata* encountered in any well drilled for oil."

So the matter comes to this: Underground waste means exactly what the two words employed in the phrase connote, namely: Underground waste refers to the leaving of oil in the ground that in the natural circumstances of the case could be recovered for commercial use. *A priori*—if the leaving of oil in the ground is the thing condemned, we paraphrase section 1 of the act in the following language: The production of crude oil or petroleum in Oklahoma, in such manner, or under such conditions, as to leave underground substantial quantities thereof that afterwards cannot be recovered, is hereby prohibited. If then, the waste

of the gas energy of an oil pool, or even the inefficient use thereof, causes underground waste in the sense developed here, this manner or method of improvident production falls within the prohibitions of the Oklahoma Conservation Act.

The waste definition of section 3 dealing with reasonable market demand is a dependent and not an independent provision. Here we do not have a positive legislative declaration that the mere production of oil in Oklahoma in excess of reasonable market demand is prohibited. Here again the concept "waste" rather than the concept "overproduction" controls. It is only when waste as defined in the statute results from or grows out of excess production that the clause "relating to market demand" becomes operative. But this precisely is the condition shown by the record. As a foundation for the rules, regulations and orders of the Corporation Commission assailed here, the Commission found that the following kinds of waste were being committed. *First*, surface waste. *Second*, economic waste in the sense that small wells throughout the state were being abandoned because of overproduction and, finally, and with greater emphasis, that underground waste, as above explained, was being committed. The court below, after full hearing, affirmed these findings. It matters not that there may be some ground for saying that both the Corporation Commission and the court below dealt with excess production, as a type of waste condemned as such by the statute. Even on this point, the record clearly does not support the appellant. The substantial thing is *that both the Corporation Commission and the court below found*

the types of waste specifically condemned by the act were being committed; that they were the result of excess production and that the limiting of production to reasonable market demands would prevent such waste. Thus the whole purpose of the Oklahoma Conservation Act was carried out.

We turn now to section 4 of the act which reads:

> "*Section 4.* That whenever the full production from any common source of supply of crude oil or petroleum in this state can only be obtained under *conditions constituting waste, as herein defined,* then any person, firm or corporation, having the right to drill into and produce oil from any such common source of supply, may take therefrom only such proportion of all crude oil and petroleum that may be produced therefrom, *without waste,* as the production of the well or wells of any such person, firm or corporation, bears to the total production of such common source of supply. The Corporation Commission is authorized to so regulate the taking of crude oil or petroleum from any or all such common sources of supply, within the State of Oklahoma, as to prevent the inequitable or unfair taking, from a common source of supply, of such crude oil or petroleum, by any person, firm or corporation, *and to prevent unreasonable discrimination in favor of any one such common source of supply as against another.*"

This section deals exclusively with waste and is but a part of the waste scheme of the act as already manifested in sections 1 and 3 thereof. In interpreting section 4, we must remember the migrating propensities of oil and gas underground, and particularly, the pool effect of gas en-

ergy. By combining sections 1 and 3 the production of petroleum in excess of the reasonable market demand is prohibited when the effect of such excess production is to cause waste. But a restraint of this character immediately brings into the matter the correlative situation of the operators producing from the same pool. The inequalities that would result from the enforcement of sections 1 and 3 are corrected by section 4. Under this section where there is excess production, and that excess production results in waste, no operator may take more than his share of the oil production *and, in consequence,* utilize no more than his share of the gas energy of the pool for producing purposes. This thought is emphasized by the later provision of the section:

> "The Corporation Commission is authorized to so regulate the taking of crude oil or petroleum from any or all such common sources of supply within the State of Oklahoma as to prevent the *inequitable or unfair taking from a common* source of supply of crude oil or petroleum by any person, firm or corporation."

Thus far section 4 deals with the prorating of production in a single pool. The section concludes:

> "' ' ' to prevent unreasonable discrimination in favor of any one such common sources of supply as against another."

What does this last phrase mean? When sections 1, 3 and 4 are considered together up to the point of the quotation just made, they deal with the several oil pools of the state as separate units in the matter of waste. Especially is this true in respect of the limiting of production to reasonable market demand to prevent waste. The nature of the subject-

matter dealt with necessitates this separate treatment. Logically, proration should be enforced only in respect of an oil pool where all the production therefrom cannot be marketed because of the interdependence of the operators in that pool upon the available market. Furthermore, the record in this case clearly shows that each oil pool has its peculiar market outlet. All purchasers do not serve all the pools and even where they do, the extent of their facilities to take the oil vary as between the pools. Hence, we have the meaning of the phrase last quoted. Each separate pool is to possess its own market and there shall be ratable taking within each pool where excess production therefrom results in waste. Finally, then, the unreasonable discrimination between and among pools here forbidden simply means that when the Corporation Commission of Oklahoma shall limit production under this act, its orders in a reasonable way shall preserve for each separate pool its actual market and prorate that market among the several operators in the pool. The record shows conclusively that this is exactly what the Oklahoma Corporation Commission did under the rules, regulations and orders assailed by the appellant here.

Section 5 is the concluding section dealing exclusively with waste, and we here insert it:

> "*Section 5. That for the purpose of determining such production, a gauge* of each well *shall be taken* under rules and regulations to be prescribed by the Corporation Commission, and said Commission is authorized and directed to make and promulgate, by proper order, such other rules and regulations, *and to em-*

ploy or appoint such agents, with the consent of the Governor, as may be necessary to enforce this act."

This section provides the machinery to enable the Corporation Commission to carry out the waste provisions of the act. Initially, to enforce ratable taking the gauge of all wells subjected thereto, is required. The record shows that this was done in all fields subject to proration under the rules and regulations of the Corporation Commission, except Oklahoma City. There, for a period as shown by the record, time proration was applied and later, a four-hour gauge was provided, and this limited gauge was taken as shown by the record because the production of the field was so far above the market outlet that this restricted gauge only could be taken. We maintain, however, that the taking of gauges to enforce proration was not the exclusive method provided by the act. This section reads:

> "* * * said Commission is authorized and directed to make and promulgate, by proper order, such other rules and regulations * * * as may be necessary to enforce this act."

In the Oklahoma City field, in providing for time proration, the Commission adopted the only method of proration applicable to conditions in that field. That method was adopted to enforce the act and, in the circumstances, was clearly within the provisions of section 5.

Heretofore, we have analyzed sections 1, 3, 4 and 5, all of which bear upon the subject of waste, are inter-related and provide a complete code for the prevention of waste, as such, in Oklahoma. We now quote section 2 which bears

no relation to waste, and which we contend is entirely independent of the waste sections of the act upon which the rules, regulations and orders of the Corporation Commission and the findings of the court below entirely were predicated.

> "*Section 2.* That the *taking* of crude oil or petroleum from any oil-bearing sand or sands in the State of Oklahoma *at a time when there is not a market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum is hereby prohibited*, and the actual value of such crude oil or petroleum at any time *shall be the average value* as near as may be ascertained in the United States at retail of the by-products of such crude oil or petroleum when refined less the cost and a reasonable profit in the business of transporting, refining and marketing the same, and the Corporation Commission of this state is hereby (in) *sic vested with the authority and power to investigate and determine from time to time the actual value of such crude oil or petroleum* by the standard herein provided, and *when so determined* said Commission shall promulgate its findings by its orders duly made and recorded, and publish the same in some newspaper of general circulation in the state."

To demonstrate the isolation and independence of section 2, it is to be observed that section 1 prohibits waste, and that alone. Section 3 defines waste, and that alone. Section 4, providing for proration, operates upon conditions constituting waste, and upon no other basis whatever. Section 5 provides the machinery for enforcing the waste provisions. In section 2, the term "waste" is not at any time, or at any place, employed. It contains its own prohibitory provisions. It does not depend upon the general prohibi-

tion of waste set forth in section 1. This section, in its essence, does these things: Prohibits the taking of crude oil from Oklahoma at less than its actual value and then provides the machinery for the determination of this value. It is a price-fixing section, pure and simple, and is entirely independent of, and separable from, the four sections of the act upon which the rules, regulations and orders of the Corporation Commission challenged here were based. Section 2 neither directly, nor indirectly, has any place in this proceeding. Appellant's case would have been stronger if section 2 had contained no prohibitory clause, but would have left that legislative direction to section 1, and it would have been stronger also from the viewpoint of the appellant if it had defined as waste, the taking of oil from Oklahoma at less than its actual value. Neither of these things occurring, the independent and separable character of section 2 is at once manifest.

Summarizing then, we interpret the Oklahoma Conservation Act under the following propositions:

(1) Sections 1, 2, 3, ~~and~~ 4 and 5 embrace all of the waste provisions of the statute and evidence a common design and purpose on the part of the Oklahoma legislature to prevent waste.

(2) Where there is an excess of production over reasonable market demand in any oil pool in Oklahoma, and where that excess production results in waste as defined by the statute, the Corporation Commission of the state may reduce production to the reasonable market de-

mand to prevent the kinds of waste that are prohibited by the statute, and that arise from the overproduction.

(3) The record shows that this was what was done by the rules, regulations and orders of the Corporation Commission assailed here.

(4) The proration provision, namely: Section 4, may be enforced only when waste obtains. The record shows that this provision was carried out according to the intent of the act.

(5) The unreasonable discrimination between pools provision of section 4 means that the market outlet of each pool reasonably shall be protected in limiting the production of the pools of the state subjected to limitation, and here again the record shows that the statutory intent was carried out.

(6) Section 2 deals with price only; provides its own rules of conduct, sets up the machinery for its enforcement and is a provision separable from and independent of the waste sections of the statute.

Point 2.

When so interpreted this act does not offend the due process clause of the Fourteenth Amendment—the equality and liberty of contract phases of appellant's contention under this heading will not be discussed.

In *Julian* v. *Capshaw,* (145 Okl. 237) 292 Pac. 841, the Supreme Court of Oklahoma upheld the constitutionality of the Oklahoma Conservation Act challenged here, and the va-

lidity of an order of the Oklahoma Corporation Commission similar to the orders attacked here. It is true that the proceeding was an original one for a writ of prohibition to restrain the enforcement of the order, but notwithstanding this limitation the holding is an authority upon both the constitutionality of the act and the orders of the Corporation Commission. The order assaulted limited production and classified the several fields subject thereto, applying different percentages of reduction, and prorated the allowable production of each field subject to the order, among the operators thereof. In substance, all the contentions that were made here, were made in this case, yet the court upheld both the act and the order.

In the light of this holding, and at the very outset, we invoke the presumption of constitutionality always attaching to a legislative act and, in addition, the announcements of this court that the wisdom of the local legislature in passing, and that of the highest court in the state in sustaining the legislation, is entitled to the greatest weight in the decision of the question here presented, because of their familiarity with local conditions and needs.

—*Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61;

Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112;

Middleton v. *Texas Power Company*, 149 U. S. 152;

Block v. *Hirsh*, 256 U. S. 135;

Gitlow v. *New York*, 268 U. S. 652;

Standard Oil Company v. *Marysville*, 279 U. S. 582;

Corporation Commission v. *Lowe*, 281 U. S. 431; *O'Gorman* v. *Hartford Insurance Company*, 282 U. S. 251.

Equally important in the decision of this case is the well-settled doctrine that when the constitutionality of a statute is open to doubt or debate, or if it is susceptible of two constructions, one favoring, the other opposing the constitutionality of the statute, it should be upheld. *Gorieb* v. *Fox*, 273 U. S. 687; *Zahn* v. *Public Works*, 274 U. S. 325; *Levy* v. *Segal*, 258 U. S. 242; *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531; *St. Louis Railway* v. *Arkansas*, 235 U. S. 350.

The essence of the question under this heading is to contrast the police power of the states with the Fourteenth Amendment. In outlining the scope of the police power as against the Fourteenth Amendment, the following fundamentals should not be overlooked.

It need be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S. 518; *Noble State Bank* v. *Haskell*, 219 U. S. 104. It is the most essential of powers, at times the most insistent and always one of the least limitable of the powers of government. *Eubank* v. *City of Richmond*, 226 U. S. 137.

Police power not only includes regulations to promote the health, peace, morals and good order of the people, but also the power to legislate *so as to increase the industries of the state, develop its resources and add to its wealth and prosperity*. *Barbier* v. *Connolly*, 113 U. S. 27.

It is also held that the concept (police power) is based upon the principle that every person ought to so use his property as not to injure his neighbors and that private interest must be made subservient to the general interests of the community. *Slaughterhouse Cases,* 16 Wall 36; *Euclid* v. *Ambler,* 272 U. S. 365.

Local conditions should be taken into account in determining the extent of the police power. *Bacon* v. *Walker,* 204 U. S. 311; *Terrace* v. *Thompson,* 263 U. S. 197.

The scope of the police power depends upon conditions as they change from time to time. A measure that would be invalid in a state of society or under economic conditions previously existing might be held constitutional by reason of a change of circumstances. *Euclid* v. *Ambler, supra; Zahn* v. *Board of Public Works, supra; Block* v. *Hirsh, supra.*

Where a strong and preponderant opinion prevails in the state that a particular statute is greatly and immediately necessary to the public welfare, that factor has an important influence in establishing the limitation of the police power in the particular case. *Muller* v. *Oregon,* 208 U. S. 412; *Noble State Bank* v. *Haskell, supra.*

Appellant devotes about four pages of his brief in declaring the rights that are created by oil and gas leases under the laws of Oklahoma. (Appellant's brief, pp. 33-37.) These considerations totally are beside the mark. The question that is before the court in this case is the degree in which appellant's rights are regulated by the Oklahoma Conservation Act and the orders of the Corporation Com-

mission made thereunder. Even then they gain slight comfort from the Oklahoma cases they cite. Not a one of them deals with the correlative rights between operators in the same pool. In *Rich* v. *Doneghey*, 71 Okl. 204, the leading Oklahoma case, defining the rights of an oil lessee, decided in 1918, three years after the adoption of the Conservation Act here involved, the court observed:

> "But with respect to such oil and gas, they had certain rights designated by the same courts as a qualified ownership thereof, but which may be more accurately stated as exclusive rights *subject to legislative control against waste* • • • ."

It matters not to what dignity or sanctity the oil and gas rights of the appellant might reach. Those rights, whatever their character, were still subject to a valid regulation of the police power of Oklahoma, and the degree of that regulation is the question here, and nothing else. In contrasting appellant's property rights and the exercise of the police power of the State of Oklahoma as evidenced by its Conservation Act and the orders of the Corporation Commission, we shall follow two methods. First, we will use the oil and gas police regulations to sustain our position, and then turn to other police regulations, of far-reaching character, regulating the use of property, that have been upheld by this court.

Both the appellant and the appellees in respect of their several contentions have cited *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, perhaps the leading case applicable here, but it appears to us that the true attitude of this decision in its immediate application is not made clear. The Indiana

statute assailed in the *Ohio Oil Company* case, on its face, was a simple one. It simply prohibited the escape of oil or gas from any well two days after it was drilled in. But this case went to the Supreme Court of the United States on the ruling of the court below on a demurrer to the answer of the defendant. In that answer the defendant alleged that it was engaged exclusively in the business of producing oil, and not gas, and that it had a large investment in its oil business; that it used the gas to recover its oil, and could not recover it otherwise; that no means had been devised to effect this result save through the use of gas. In this predicament the case went to the Supreme Court of the United States. Here, in effect, there was a complete deprivation of property, not a partial deprivation of the character depended upon by the appellant in this case. Basing its decision upon the doctrine of correlative rights obtaining in an oil pool, the court held that the statute did not violate the Fourteenth Amendment. *Lindsley* v. *Natural Carbonic Gas Company,* 220 U. S. 61, also cited by both parties, goes off on the doctrine of regulation of correlative rights. Here again we have an absolute authority that correlative rights may be adjusted and regulated by the police power of the state.

While *Walls* v. *Midland Carbon Company,* 254 U. S. 300, involves the regulation of correlative rights under the police power it assumes the broader phase of a state's interest in its natural resources and for that reason requires more extended comment. Here the Carbon Company, which challenged the constitutionality of the Wyoming Act in question, had made an investment of $375,000.00 in a plant

for the manufacture of carbon block from natural gas in Wyoming before the passage of the act. The prohibition of the act was not absolute. It applied only when the gas supply was within ten miles of an incorporated town or industrial plant, and even then it did not apply if the residue gas, that is, the gas remaining after it was used for the manufacture of carbon black, was utilized for manufacturing or domestic purposes. With these exceptions the use of gas was declared to be a wasteful and extravagant use and such use prohibited. The gas supply of the Carbon Company came within the condemnation of the act; that is, it was within ten miles of the City of Lovell. Furthermore, it was not using the residue gas for industrial and domestic purposes. The correlative phase of the case arose from the fact that the Lovell Gas and Electric Company, an industry furnishing gas and electricity to the town of Lovell, obtained its supply of gas for these purposes from the same reservoir that the Carbon Company was obtaining its gas. The proof showed that the town of Lovell would have an adequate supply of gas for thirty years from the reservoir, if the wasteful uses resorted to by the Carbon Company in the manufacture of carbon black were not perpetrated. On the other hand, if its use were permitted to continue there was available to the town a supply for three years only. The court under the doctrine of correlative rights, and under the authority of the *Ohio Oil* and *Lindsley* cases, sustained the act. It is clear from this holding that an element of the decision was the state's interest in the preservation of its natural resources which carried the

case beyond the *Ohio Oil* and *Lindsley* cases. This language of Judge McKenna is enlightening:

> "And there is great disproportion between the gas and the product (carbon black), and necessarily there was presented to the judgment and policy of the state a comparison of utilities which involved as well the preservation of the natural resources of the state, and the equal participation in them by the people of the state. And the duration of this utility was for the consideration of the state, and we do not think that the state was required by the Constitution of the United States to stand idly by while these resources were disproportionately used, *or used in such way that tended to their depletion*, having no power of interference." (Italics ours.)

Not only do we here have a clear announcement of the state's power to preserve its natural resources for the use of its people, but we have the doctrine that in considering the constitutionality of a state police statute, the Supreme Court of the United States may weigh the relative economic advantages that will result to the state with the statute or without it. Such, clearly, was the attitude of this court in *Miller* v. *Schoene*, 276 U. S. 272, where, in effect, the value of cedar trees and the value of apple orchards of Virginia were compared in upholding a police statute of the state designed to protect the apple industry of Virginia.

In searching the exact question now considered, *Oxford Oil Company* v. *Atlantic Producing Company*, 22 Fed. (2d) 597 (Fifth Circuit), and *Marrs* v. *City of Oxford*, 32 Fed. (2d) 134 (Eighth Circuit), must not be overlooked. In the *Atlantic* case, the decision rested on a comparatively

narrow ground. An Act of the Texas Legislature conferred upon the Railroad Commission of that state the power to adopt rules and regulations to conserve the oil and gas resources of the state. Under this general authority, the Railroad Commission of Texas promulgated Rule 37 which provided among other things that no wells shall be drilled nearer than 150 feet to any property line provided that the Commission, in order to prevent waste, or to protect vested rights, should grant exceptions permitting drilling within shorter distances. Here, the Oxford Company owned a lease on a long strip of 3190 feet, 56 feet wide at one end and 86 feet wide at the other. It was in the situation of the appellant here. It owns small tracts interspersed with larger ones. Owing to the limited extent of its holding, to obey the order of the Texas Railroad Commission literally, was to deprive it of the right to drill entirely, other companies holding rather extensive acreage adjoining the strip. The Oxford Company claimed the right to drill ten wells on its strip. Under the reserve power of the Railroad Commission, it permitted the Oxford Company locations for four wells. Suit was brought by the Oxford Company to enjoin the drilling limitation imposed upon it by the supplemental order of the Railroad Commission on the ground that its property was taken without due process of law. On the doctrine of correlative rights, and under the authority of *Ohio Oil Company* v. *Indiana* and *Lindsley* v. *Natural Carbonic Gas Company*, it was held that it was within the power of the legislature to lay down a general rule for the protection of the mineral rights of the owners of adjoining land and to leave the details of enforcing that rule to

an administrative agency. The pertinent thing being that it was claimed that the Fourteenth Amendment was violated by this holding, it is important to observe that a writ of *certiorari* was denied by this court. 277 U. S. 285. Of equal, if not, greater importance in contrasting police power and due process is the *City of Oxford* case. This case involved a town-lot drilling proposition identical to the situation of the appellant. The town of Oxford, Kansas, by ordinance, had provided, in effect, that no more than one well should be drilled to a town block; that the owners of the leases covering the other lots in the block should be permitted to participate in the production from this well by contributing to the cost of drilling and operation on a footage basis. Marrs, claiming the right to drill on his own lot regardless of this ordinance, brought suit to enjoin the enforcement thereof under the Fourteenth Amendment. *This was an extreme case of the adjustment of correlative rights.* The court held that the statute was intended to protect rather than to destroy correlative rights and that under the *Ohio* case the ordinance was sustainable. Here again, notwithstanding the alleged serious character of the right infringed under the Fourteenth Amendment, a writ of *certiorari* was denied by this court. 280 U. S. 563.

This brings us to the recent *Bandini* cases from California which, in the main, deal with correlative rights and the exercise of the police power of the state to adjust and regulate them. In the *Bandini* case, the Act of California forbade the unreasonable waste of natural gas. (California Statutes 1929, p. 923.) Under the statute a decree was entered by the Superior Court for Los Angeles County estab-

lishing a gas oil ratio for the production of oil from the Santa Fe Springs field applicable to the Bandini Petroleum Company, and under this ratio the daily production of the Bandini Company substantially was cut in half, namely, an unrestricted flow of 19,554 barrels was limited to 10,211 barrels. The statute, and its application, was attacked as unconstitutional by the Bandini Company as a taking of property under the Fourteenth Amendment. While the public interest aspect was referred to by the Court of Appeals, the decision in its essence was based upon the coexisting correlative rights of adjoining owners and the police statute upheld on that basis. We are not unmindful of the fact that this case came to the Court of Appeals on the narrow ground of applying to that court for a writ of prohibition to enforce the injunction of the trial court. *Bandini Petroleum Company* v. *Superior Court*, 293 Pac. 899. On a broader ground, however, the same decree went to the Supreme Court of California in *People* v. *Associated Oil Company*, 294 Pac. 717. Here, while the matter of correlative rights was referred to, the conclusion is inescapable that the real basis of the decision of the Supreme Court of California was that of the public interest in the natural resources of the state, the court saying:

> "We are entirely satisfied that the waste of these natural resources may be regulated and the unreasonable waste thereof may be prohibited in the exercise of the police power of the state."

When the *Bandini* case came to this court from the writ of prohibition refused by the California Court of Appeals, this court very properly, within the limitations of the case

before it, upheld the California statute as one not impinging the Fourteenth Amendment on its face, stressed the matter of protecting correlative rights, and yet observed that the Supreme Court of California in another angle, in the same litigation, had emphasized the public interest phase of this question. *Bandini Petroleum Company* v. *Superior Court*, 76 L. ed. 123.

Departing from the oil cases and addressing ourselves to the fundamentals, again we refer to certain settled principles. No definite rule can be laid down to determine the police power of the states. *Hudson County Water Company* v. *McCarter*, 209 U. S. 349. In the *Euclid* case, it is said:

> "The line which this field (police power) separates the legitimate from the illegitimate assumption of power is not capable of process delimitation. It varies with circumstances and conditions." *Euclid* v. *Ambler Realty Company*, 71 L. ed. 171.

The burden is on the party attacking the constitutionality of the particular statute to establish the invalidating facts. *Minnesota Rate Cases*, 230 U. S. 352; *Weaver* v. *Palmer*, 270 U. S. 402. If a regulatory statute is clearly arbitrary and unreasonable in its infringement of property rights, it falls within the condemnation of the due process clause. *Gorieb* v. *Fox, supra; Zahn* v. *Board of Public Works, supra; Eubank* v. *City of Richmond, supra.* Late decisions evidence a pronounced tendency on the part of the court toward a closer scrutiny of the factual situation when called upon to determine the constitutionality of a police statute. *Muller* v. *Oregon, supra; Chastleton Corporation* v. *Sinclair*,

264 U. S. 543. Within these general principles we will advert to those cases where police statutes of the states have been upheld.

The Zoning Cases in principle are in themselves significant. *Hadacheck* v. *Sebastian*, 259 U. S. 394, the brick plant inhibited was alleged to have a value of $800,000.00 should the zoning ordinance not be effective. Under the ordinance it would have a value of but $60,000.00. In *Miller* v. *Schoene*, 276 U. S. 272, there was a balancing of the economic situation of Virginia. Cedar trees, on the one side, not so important to the economics of the state. Apple orchards, on the other, one of the most important industries of the state. A statute designed to protect the latter and annihilate the former was upheld. In short, the classic language of Mr. Justice HOLMES, in *Pennsylvania Coal Company* v. *Mahon*, a case cited by the appellant, the degree of taking is the test between the police power on one side and the Fourteenth Amendment on the other. If the regulation goes too far in the taking of property, it offends the Fourteenth Amendment. If not, the statute is valid. *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393.

Applying these principles to this case, we have the following situation: Appellant owns isolated oil tracts in the Oklahoma City field less than 35 acres in extent. Against this the field has 10,000 acres of producing territory. The appellant owns ten producing wells; 88 per cent of the wells, as shown by the record, and 90 per cent of the production from the field, are obeying the orders of the Corporation Commission. Appellant claims that by reason of

its peculiar advantage, namely, its pipe line outlet, and its ability to handle all of its production, it should be permitted to do so. It makes this contention against 88 per cent of the wells of the field and against 90 per cent of the production. It ignores completely its correlative obligations to its neighbors of which it has already taken tremendous advantage, and it ignores the drainage characteristics of the field, and more important still, it ignores the gas energy factor which produces the oil. Against this unbridled and purely mechanical and capitalistic advantage of the appellant stands the unfortunate situation of its neighbors. Every barrel of oil and every thousand feet of gas energy which the appellant shall use above that allowed its neighbors redounds to its peculiar advantage. The design of the Oklahoma Conservation Act and the design of the orders of the Oklahoma Corporation Commission were to prevent this. The appellant never was deprived of taking its fair share of any oil from its property. It was never deprived of taking its fair share of the gas energy to produce that oil. All that the act and the orders of the Corporation Commission complained of did, was to hold it to an equality of taking between it and the other operators in the field. In these circumstances, it was a valid and reasonable exercise of the police power.

Another circumstance of important bearing enters into the decision of this case. The Oklahoma Conservation Act applies only during periods of overproduction. Furthermore, the orders complained of are for three months' periods subject to re-adjustment. Both the act and the orders are emergency requirements. This would sustain their va-

lidity even if they were otherwise invalid. *Block* v. *Hirsh*, 256 U. S. 135; *Brown Holding Company* v. *Feldman*, 256 U. S. 170. Deprivation of the liberty to contract is but a phase of the property clause of the Fourteenth Amendment, and the equality clause of that amendment is so completely beyond the scope of this case that we shall not take time to argue either of these questions.

Point 3.

Section 2 of the Oklahoma Conservation Act, the price fixing provision, clearly is separable from the waste provisions of the act, namely, sections 1, 3, 4 and 5, which alone are material to this controversy.

This subject has been treated as fully as it can be treated by us under Point 1. We think that we there demonstrated that section 2 is an independent and distinct provision of the act, and since section 10 provides that the invalidity of any section of the act shall not affect the validity of the remaining portion thereof, we are content to submit this feature of the case on the proposition that if the court shall uphold the waste sections as constitutional, no merit shall be found in the contention of counsel for appellant that the waste sections and section 2 are dependent and non-separable.

Point 4.

There is no such uncertainty in respect of the meaning of the terms "waste," "underground waste" and "waste incident to the production of crude oil and petroleum in excess of transportation or market facilities or reasonable market demands," as these terms appear in section 3 of the act as to render the act void on that ground.

We must admit a certain difficulty in understanding the charges of uncertainty by counsel for appellant. They are unrelated, confusing, and in the strict merits of this case lead nowhere. If we are right in our interpretation of the meaning of the terms "ordinary waste" and "underground waste" under Point 1, those two terms at least are not open to the charge of statutory uncertainty. If the term "economic waste" has the qualified meaning we there attributed to it, that phrase equally is proof against the charge of uncertainty. What counsel for appellant apparently do not apprehend is that the market demand clause is a dependent one, and that it is operative only when one or more of the other elements of waste defined by the statute appear. Such, precisely, was the nature of the orders entered by the Corporation Commission. The Commission found that there was physical waste, underground waste, and economic waste, and the lower court held that these findings were sustained by the evidence. In addition, the evidence before the court below sustained findings to the same effect. This leaves open a single question, the phrase, "unreasonable market demand." In our view of the case, this means nothing more or less than market demand.

The term "reasonable," gives to this provision the elasticity which modern, commercial intercourse necessarily demands. No one can determine the exact extent of the market demand of any commodity in the United States largely dealt in at a given point of time. The word "reasonable," was the natural one to be attached to this concept in all the circumstances of the case. The record further shows that the Oklahoma Corporation Commission made every proper effort to ascertain the reasonable market demand every time it made an order. The orders were of three months' duration only, and to adjust any possible inequalities liberty was given to increase, or decrease, the allowable output to the demand within the three months' period.

The courts, long ago, departed from the strict principles of exact statutory certainty, especially so where the general rule of conduct was laid down by the statute to be carried out by an administrative body. The complexities of modern, industrial and commercial life necessarily require this relaxation of former precedents. The authorities upon this question are without number. *Mahler* v. *Eby,* 264 U. S. 32; *Field* v. *Clark,* 143 U. S. 649; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Mutual Film Corporation* v. *Industrial Commission,* 236 U. S. 247. Unfair methods of competition: *Federal Trade Commission* v. *Beechnut,* 257 U. S. 441. The *Cedar Rust* case of Virginia held not uncertain. *Miller* v. *Schoene,* 276 U. S. 272. Regulation of hours of employment, *except in case of emergency, upheld. B. & O. R. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612. There is no uncertainty under a statute giving to the Secretary of War the power to determine that a bridge is an unrea-

sonable obstruction to navigation. *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177; *Hannibal Bridge Co.* v. *United States,* 221 U. S. 194. To emphasize the thought considered here, this court, because of the very complexity of the subject dealt with, read the word "unreasonable" in an absolute statutory mandate against an unlawful restraint of trade. *The Standard Oil Case,* 221 U. S. 1; the *American Tobacco Case,* 221 U. S. 119.

Keeping in mind that reasonable market demand is a dependent, rather than an independent provision of section 3, that it operates only when exact criteria of waste are determined by the Corporation Commission, we have the compelling precedence before us of the two California cases where the statute, in express terms, condemned the unreasonable waste of gas and yet where, to ascertain that there had been an unreasonable waste of gas, complex factors had to be taken into account. The charge of uncertainty was made before the California Court of Appeals and before the Supreme Court as well, and there rejected. *Bandini Petroleum Co.* v. *Superior Court,* 293 Pac. 905; *People* v. *Associated Oil Co.,* 294 Pac. 724. In the latter case, the court said:

> "The best mean ratio, or the amount of gas which bears a reasonable proportion to the amount of oil produced, may vary for each reservoir or deposit of oil, depending upon the natural characteristics above mentioned, and may, and probably does, vary for each well drilled into the same reservoir, depending upon the location of the well and other factors. Therefore, because of the many and varying conditions peculiar to

each reservoir and to each well, which will bear upon a determination of what is a reasonable proportion of gas to the amount of oil produced, it may be said that it would be impossible for the legislature to frame a measure based on ratios or percentages or definite proportions that would operate without discrimination, and that what is a fair proportion of gas to the amount of oil produced from each well or reservoir is a matter which may be ascertained to a fair degree of certainty in each individual case."

This court adopted the reasoning of the Supreme Court of California. *Bandini Petroleum Co.* v. *Superior Court*, 76 L. ed. 128. As it was impossible, under the California statute, to lay down a different rule regarding the waste of gas, than the one prohibiting the unreasonable waste of such gas, then, in a similar state of affairs, it was equally impossible for the Oklahoma legislature to do more than to prevent waste by limiting production to the reasonable market demand, when production in excess of that figure resulted in one or more of the kinds of waste condemned by the statute.

Point 5.

There was no delegation of legislative power by this act. The legislative prohibitions are clear and certain and the power conferred upon the Oklahoma Corporation Commission by the act was that of applying the standards of waste as established by the legislature to the peculiar facts of a case. In short, an administrative duty, nothing more, was imposed upon the Corporation Commission by the Oklahoma Conservation Act.

If our arguments under the earlier points of this brief

shall be sustained, there is no basis for reversal under this heading. The Oklahoma Conservation Act, within adequate bounds, lays down requisite rules of conduct. To administer these rules within the clear necessities of the case, administrative duties are imposed upon the Oklahoma Corporation Commission to carry them into effect. The duties so imposed are quite in keeping with similar responsibilities cast upon federal and state agencies, upheld by decisions too numerous to mention. In light of the recent decisions as distinguished from the more rigid requirements of the earlier cases, there is no possible basis for the upholding of the proposition that is here negatived. The Oklahoma statute states the rule of conduct. The Oklahoma Corporation Commission, after notice and hearing, applies it to the facts of the particular case, and, with these two circumstances admitted, the affirmative of the question we are now urging clearly comes within the modern principles of administrative law.

POINT 6.

The rules, regulations and orders of the Oklahoma Corporation Commission assailed by appellant here as unconstitutional and void clearly are within the provisions of the Oklahoma Conservation Act; hence it follows that all such proceedings of the Commission are immune from attack.

Under the act, the Oklahoma Corporation Commission entered the orders assailed by the appellant after due notice and full hearing, thus answering two of the important elements of due process. It found that at least three types of waste clearly and specifically condemned by the act were

occurring, namely, surface waste, underground waste, and economic waste. Repeatedly, the waste of gas energy in the Oklahoma City field and its effect upon ultimate recovery was adverted to by the Commission. Aside from every other consideration, the finding that any one of the wastes just referred to was occurring would have supported the orders. Then, the Commission supplied the ultimate requirement and purpose of the Oklahoma Conservation Act by finding that these wastes and each of them were caused by the production of oil in excess of the reasonable market demand. The underlying purpose of the Oklahoma statute was to prevent waste and, so far as this case is concerned, waste was to be prevented by adjusting production to the market. Not only this, but the other elements of the statute strictly were followed. The ultimate fact of excess production being ascertained, the allowable production was allocated to the pools of the state, each obtaining its actual market outlet so that there should be no discrimination between pools, one of the things condemned by the statute. Then, in addition, and within each of the pools, each operator was to obtain his share of the market allowed for his pool. The orders, in their very essence, represented nothing more or less than a sane, equitable and fair working out of the economics of the situation, and this, precisely, was what the Oklahoma Conservation Act was designed to accomplish. The trial court not only upheld all the findings upon which the orders of the Corporation Commission were based, and the orders entered in pursuance thereof, but heard all the new evidence appellant had to offer, and upon that foundation found against the appellant. If, then, we

have correctly interpreted the Oklahoma Conservation Law and, if that law when so interpreted stands above the Fourteenth Amendment, we emphasize the consideration that the orders assailed here clearly are within the provisions of the act, and therefore they, too, withstand any assault made in virtue of the Fourteenth Amendment.

Point 7.

The duties committed to, or discharged by the proration umpire and operators' committees, under the direction of the Oklahoma Corporation Commission, do not have the effect of invalidating the rules, regulations and orders of the Commission complained of by appellant in this case.

The negative of the above proposition is strongly urged by counsel for appellant, so strongly in fact that it made some impression on the majority opinion of the court below. As we view the case, neither counsel for appellant nor the court below sensed this proposition in its true proportion. That proportion is that regardless of what was done by the umpire and regardless of what was done by the operators' committee, the *judgment* of the Corporation Commission was the ultimate thing. That, and that alone, controlled. Under the statute, the Corporation Commission had the power to appoint the umpire, with the approval of the governor, which was done. Independently of the statute it probably had the informal right to consult the advice of operators' committees skilled in this business. These, in a statutory sense, were helpful aids. An impartial search of the record will show that in all essential particulars the judgment of the Corporation Commission controlled and

this is the important thing. While the majority in its opinion below criticized the actions of the umpire and the operators' committee, it clearly sensed this principle. In sustaining our position in this regard, the irrigation and drainage cases are helpful. Interested parties were always involved in these proceedings. Frequently, they had a part in the actual direction of the project, and yet in no instance was this indirect participation permitted to over-ride the constitutionality of the act for the obvious reason that there was a statutory body that ultimately gave its official sanction to what was done. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *Hager* v. *Reclamation District*, 111 U. S. 701; *O'Neill* v. *Leamer*, 239 U. S. 244. To illustrate the exact contention that we are making here, some of the other holdings of this court should be referred to. Where the adoption of a set-back ordinance depended upon the will of a certain percentage of the interested parties, it was held to violate the Fourteenth Amendment. *Eubank* v. *City of Richmond*, 226 U. S. 137. But, where the question was determined by official sanction, although initiated by the property owners, the rule was different. *Gorieb* v. *Fox*, 274 U. S. 603. Even more compelling is *Miller* v. *Schoene*, 276 U. S. 217, where the proceeding could be instituted by parties holding an adverse property interest, but where the official sanction of a single public official was the determining factor.

Touching this question generally, we refer to *Cusack Co.* v. *Chicago*, 242 U. S. 526; *Lent* v. *Tillson*, 140 U. S. 316; *Hibben* v. *Smith*, 191 U. S. 310. In *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, an act of the Pennsylvania

legislature required the owners of adjoining coal properties to leave a pillar of coal along the property lines of sufficient thickness to cover the safety of employees. The width of the pillar was to be determined by the engineers of the adjoining properties together with the district mine inspector. It was here contended that the act was unconstitutional under the Fourteenth Amendment. No one can read this case without perceiving that while the engineers of the adjoining properties were to act with the mine inspector, it was the *judgment* of the mine inspector that controlled. This, precisely, is the case here presented. Under the record, the judgment of the Oklahoma Corporation Commismission, first in entering, and then in carrying out the orders complained of, always controlled. This puts the case above the Fourteenth Amendment.

Point 8.

Neither the Oklahoma Conservation Act, nor the rules, regulations or orders of the Oklahoma Corporation Commission made thereunder, the subjects of assault here, offend the commerce clause of the Federal Constitution.

We cannot believe that counsel for appellant are advancing the affirmative of this proposition aggressively. To do so, is to strike down every conception which the American lawyer has of the division of power between the nation and the states. The production of oil is a matter of local and not of national concern. *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238; *Crescent Cotton*

Oil Co. v. *Mississippi,* 257 U. S. 129. In *Ohio Oil Co.* v. *Indiana,* involving an oil conservation statute, this court held that the matter was one of local and not national regulation. In the child labor cases, division of power between the national government and the state governments under the commerce clause was most vigorously advocated. Perhaps no aspect of this problem came to the court with more overwhelming public opinion behind it, one way or the other. The court held the regulation of child labor in a manufacturer's enterprise of a state was one of state and not national concern. *Hammer* v. *Dagenhart,* 247 U. S. 251. Even where the same object was attempted to be accomplished by the tax power, the ruling was the same. *Child Labor Tax Case,* 259 U. S. 20. As a fundamental proposition two principles obtain. Interstate commerce does not attach until the movement in the current of interstate commerce begins. *Secondly,* that the product is intended for interstate commerce, has nothing to do with it. In these circumstances, the regulation of production in Oklahoma to promote a local purpose, that is to prevent waste, is essentially local. If we cannot uphold this principle, the division of national and state power as ordained by the constitution becomes a nullity. On this branch of the case, if we can sustain the other contentions that we have urged here, we have no doubt about the result.

Conclusion.

This brief is written from the viewpoint of the Oil States Advisory Committee. We have read the brief of counsel for appellant, but we have never seen the brief of counsel for the appellees. We have referred to the creation of the Federal Oil Conservation Board by the president and the creation of this committee which, in effect, grew out of that action. Our interest in the questions presented here are far more fundamental than the interest of either of the parties. With every possible allowance, we cannot escape the conviction that the appellant takes a purely individualistic and selfish point of view. It has a market outlet for all its oil. It has the capital to provide that outlet. It ignores completely that the business of producing oil is distinguishable from other private, individualistic enterprise. In an oil pool, it is but one of a number of other operators who must make use of the same general force, the gas energy, and that necessarily establishes not only correlative obligations on its part, but correlative rights against it and in favor of the other operators in the pool. The Oklahoma law is a far-reaching attempt on the part of an American state to reach this difficult and complex question. In the main, the model established by the statute has been followed in three other important oil producing states. It is because of these things that the Oil States Ad-

visory Committee, in the public interest, deemed it a duty to file this brief.

Respectfully submitted,

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APPENDIX A.

"December 19, 1924.

"To the Secretary of War,
Secretary of the Navy,
Secretary of the Interior,
Secretary of Commerce.

"SIRS: It is evident that the present methods of capturing our oil deposits is wasteful to an alarming degree in that it becomes impossible to conserve oil in the ground under our present leasing and royalty practices if a neighboring owner or lessee desires to gain possession of his deposits.

"Developing aircrafts indicate that our national defense must be supplemented, if not dominated, by aviation. It is even probable that the supremacy of nations may be determined by the possession of available petroleum and its products.

"I am advised that our current oil supply is kept up only by drilling many thousands of new wells each year, and that the failure to bring in producing wells for a two-year period would slow down the wheels of industry and bring serious industrial depression. The problem of a future shortage in fuel and lubricating oil, not to mention gasoline, must be avoided or our manufacturing productivity will be curtailed to an extent not easily calculated.

"We are not today, however, facing an undersupply of oil. The production of our 300,000 wells is in excess of our immediate requirements. That overproduction in itself encourages cheapness, which in turn leads to wastefulness and disregard of essential values. Oil, of which our resources are limited, is largely taking the place of coal, the supply of which seems to be unlimited, but coal cannot take the place of oil in most of its higher uses, on land or sea or in the air.

"For the purpose of giving this responsibility of government in all its aspects the consideration it demands, I have constituted a Federal Oil Conservation Broad consisting of the Secretaries of War, Navy, Interior, and Commerce, to study the government's responsibilities and to enlist the full cooperation of representatives of the oil industry in the investigation. The government itself is at present one of the largest lessors of oil lands, and the public domain still includes large undeveloped reserves of oil, so that the administration of oil resources is a practical question with the Department of the Interior.

"I would express the desire that these conferences may be open and exhaustive. The oil industry itself might be permitted to determine its own future. That future might be left to the simple working of the law of supply and demand but for the patent fact that the oil industry's welfare is so intimately linked with the industrial prosperity and safety of the whole people, that government and business can well join forces to work out this problem of practical conservation.

"Last March I appointed a commission to advise me on the special subject of the best policy to insure the future supply of fuel oil for the Navy. That commission will continue to function in its limited field and might to advantage sit with the Conservation Board in the conferences I expect will be between these four Secretaries directly concerned and the outstanding producers of petroleum. Similarly, the members of the Conservation Board will call upon their technical advisers in the bureaus to contribute to the full discussion of ways and means of safeguarding the national security through conservation of our oil.

"Very truly yours,

"CALVIN COOLIDGE."